and present costs, in order to entitle the debtor to a stay of proceedings: *Gibbon* v. *Copeman*, 5 Taunt. 840.

And in the English practice the debtor may always pay money into court, at any time during the pendency of the suit, to cover the costs already accrued, and a certain amount of the debt, which he admits to be due, and thereupon obtain a rule upon the plaintiff to accept the same or else thereafter proceed at the peril of recovering no more costs, and also paying the defendant's costs after that time, unless he should recover a greater amount of debt than had been thus offered: *Cooper* v. *Blick*, 2 Adolphus & Ellis 971; *Hyde* v. *Moffat*, 16 Ver. 271, 286. This is allowed under the English statute of 3 & 4 Wm. 4, c. 42, s. 21, and extends to all personal actions, with certain exceptions, such as assault and battery, false imprisonment, libel, slander and seduction. But by 1 Vict. c. 7, these excepted actions are many of them embraced. A single judge may make the order for paying money into court even before declaration filed: *Edwards* v. *Price*, 6 Dowl. P. C. 489. It would seem that the right of the defendant to pay money into court, in all these actions where the claim was for a definite amount, and where by consequence a tender at common law might be made, has been recognised, in the English courts, from an early day, long before the date of the statute just referred to: *Lawrence* v. *Cox*, Bull. N. P. 24; *Vernon* v. *Wynne*, 1 H. Bl. 24; *Hitton* v. *Bolton*, Id. 229 n.; Tidd's Practice 670; *Fail* v. *Pickford*, 2 B. & P. 234. Money was not formerly allowed to be paid into court after plea pleaded: *Thorton*, *q. t.* v. *Gibson*, 1 Wils. 157. But in later times, in the English practice, it has been allowed to be paid into court even after a new trial: Tidd's Practice 672.

The plaintiff may at any time take the money out of court upon discontinuing his action and deducting the defendants' costs after the same was paid into court: *Foulstone* v. *Blackmore*, 1 Y. & J. 213. The statute of 3 & 4 Wm. 4, before referred to, seems to recognise the right of the English judges to make rules in regard to the payment of the costs of the action, and the practice seems to have sometimes prevailed for the defendant to enter into a rule for the plaintiff to sign judgment for his costs upon accepting the money, and if that were done at a stage of the proceedings after the money is paid in, the defendant's future costs will be deducted from the plaintiff's costs.

If the money is paid in upon a portion of the plaintiff's claims, he will be at liberty to accept it and proceed for the remainder: 4 Bing. N. C. 814; 4 M. & W. 2. But we need not pursue the subject further. Although the subject of tender and payment of money into court is somewhat familiar, it is one of great practical importance, since the costs of litigation become often of vital consequence. The principal case seems to us a valuable one.

I. F. R.

Supreme Court of Errors of Connecticut.

MAPLES *v.* THE NEW YORK AND NEW HAVEN RAILROAD COMPANY.

The plaintiff purchased of the defendants a commutation ticket, which conferred upon him the right to ride in the cars upon the defendants' railroad between the city of New York and the town of Westport during the ensuing year, upon certain

conditions. One of the conditions was that the ticket should be shown to conductors when requested, or when required by the rules of the company. One of the company's rules in force during the year required commuters to show their tickets to conductors when required, in the same manner as other passengers. At the time of purchasing the ticket the plaintiff signed a receipt containing similar conditions. During the year, while the plaintiff was riding in the defendants' cars between New York and Westport, he was requested by the conductor to show his ticket. The plaintiff had his ticket upon his person, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but acting in accordance with the instructions of the defendants, he demanded of the plaintiff his fare for the trip, and on his refusal to pay it ejected him from the train.

Held, that the plaintiff was not bound to produce his ticket immediately when requested, but was entitled to a reasonable time to find it, and was entitled to ride as long as there was any reasonable expectation of finding it during the trip; that under the circumstances the production of his ticket by the plaintiff was the merest formality, and that in the absence of an express stipulation in the contract that the plaintiff should pay the fare of the passage unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendants in rescinding it, and treating the plaintiff as a trespasser on the train; and that if the defendants had a right to eject the plaintiff from the train, they had no right to do so elsewhere than at a regular station on the road—that any rule or regulation of the defendants which required or allowed such an act to be done between stations to a person in the condition of the plaintiff was unreasonable and void.

TRESPASS ON THE CASE, for the ejection of the plaintiff from the defendants' cars by a conductor; brought to the Superior Court, and tried on the general issue closed to the jury. The court rendered judgment of nonsuit, and the plaintiff filed a motion in error for the refusal of the court to set aside the nonsuit. The facts are sufficiently stated in the opinion.

Thompson, for the plaintiff in error.

Child, for the defendants in error.

PARK, J.—We think there is manifest error in the decision of the court below in refusing to set aside the nonsuit that had been ordered by the court. Some time in the month of December 1868, the plaintiff purchased of the defendants a commutation ticket, which conferred upon him the right to ride in the cars upon the defendants' railroad from the town of Westport to the city of New York, during the year 1869, upon certain conditions. One of the conditions was that the ticket should be shown to conductors

when requested, or when required by the rules of the company. One of the company's rules in force during the year, and the only one that it is important to consider, was as follows: "Commuters will show their tickets to the conductors in the same manner as other passengers, when required." One of the conditions in the receipt signed by the plaintiff at the time he received his commutation ticket from the defendants was to this effect: "The commutation ticket is to be shown to conductors, and whenever otherwise required by the rules of the company, in the same manner as are other passenger tickets."

On the 24th day of May 1869, the plaintiff entered the cars of the defendants at the city of New York, to ride over the defendants' road to his home in Westport. When the train was about four miles from the city the conductor of the train requested the plaintiff to show his ticket. The plaintiff had his ticket, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time mentioned in the ticket had not expired, but acting in accordance with the instructions of the defendants, he demanded of the plaintiff his fare for the trip, and told him that unless he paid it he should eject him from the train. The plaintiff refused to pay the fare, on the ground that he had his ticket but was unable to find it, and had paid his fare by the purchase of the ticket. Thereupon the conductor stopped the train and ejected the plaintiff from the cars. During the morning of that day the plaintiff rode to New York on his ticket, and at night when he retired it was found upon his person. These are the principal facts, and we think they show that the defendants broke their contract with the plaintiff in ejecting him from the train at the time it was done. When the conductor requested the plaintiff to produce his ticket it happened to be mislaid. The plaintiff was entitled to a reasonable time to find it. The contract required him to show his ticket to the conductor, but he was not bound to do it immediately when requested. The conductor knew the plaintiff was a commuter, and the only question in his mind was whether the plaintiff would be able to produce his ticket. The plaintiff informed him that he had it, but was unable to find it because it was mislaid. Under such circumstances the plaintiff was entitled to ride as long as there was any reasonable expectation of finding it during the trip. Had a reasonable time

been allowed him to find it, undoubtedly it would have been found, for it was upon his person, and dropped from his garments when he undressed himself to retire that night. The case was unlike that of *Downs* v. *New York & New Haven Railroad Co.*, 36 Conn. 287. There the plaintiff had left his ticket at home, and so informed the conductor. The ticket could not by possibility be produced, and the plaintiff knew it, and so did the conductor. Delay in that case would have been of no avail. The fact was certain. The case here is directly the opposite of that in this important respect.

Again, in the case of Downs there was an express stipulation in the contract that he should pay his fare for the trip if the ticket should not be shown to the conductor when requested. Here there was no such stipulation. It is true the contract required the plaintiff to show his ticket to conductors when requested by them, or when required by the rules of the company, but it may well be questioned whether the breach of such a condition in the contract gave the defendants the right to eject him from the train, when they knew through their conductor that he was a commuter, and knew that his inability to produce the ticket arose simply from the fact that his ticket was mislaid. In the case of Downs the trip was virtually excepted from the operation of the ticket by the express stipulation in the contract to pay fare for the trip if the ticket should not be produced. The case was the same as it would have been if the contract had declared in express terms that the ticket should only apply to cases where it was produced, and all other cases should be excepted from its operation. Downs, therefore, was nothing more than a common passenger on the train, without a common passenger ticket, and was liable to be dealt with as a common passenger. But here the contract embraced the trip as much as it did any other trip that the plaintiff might make on the road. The plaintiff agreed to show his ticket in like manner with other passengers. This was required in order that the conductor might know that he was a commuter. But the conductor knew the fact.

The production of the ticket under such circumstances was the merest formality. Suppose the plaintiff had agreed with the defendants that he would show his ticket to the conductor three times during each passage over the road, and on the trip in question he had shown his ticket twice to the conductor, but when

required the third time to produce it the ticket happened to be mislaid. Suppose the conductor should distinctly remember that the ticket had been twice produced, and the production of it the third time would give him no needful information. Would the defendants be justified in ejecting him from the train without an express stipulation in the contract that the plaintiff should pay the fare of the passage unless the ticket should be three times produced? We think not. So we think here. There must be something more than the merest technical breach of the contract, in order to justify the defendants in rescinding it so far as it applied to the trip, and treating the plaintiff as a trespasser upon the train.

We have made no allusion to the order that was passed by the defendants in January, after the plaintiff purchased his ticket. That order has no application to the case, for it is obvious that the defendants could not at that time add new conditions to the plaintiff's contract. That order was in force when Downs made his contract with the defendants, and it was an important consideration in the decision of that case.

Again, we think on another ground that the plaintiff made out a *primâ facie* case against the defendants. The plaintiff was ejected from the train at Harlem, which was not a station on the defendants' road. Conceding that under the circumstances we have detailed, the defendants had the right to eject the plaintiff from the train, we think they had no right to do it elsewhere than at some regular station on the road. Any rule or regulation of the defendants that requires or allows such an act to be done between stations to a person in the condition of the plaintiff, thus subjecting him to the trouble and expense of going a number of miles in order to take another train, savors too much of vindictiveness to be reasonable. We have no hesitation in saying that such a rule is unreasonable, and is therefore void so far as it applies to a case like the one under consideration. We say this without reference to the statute of 1867. Whether that statute applies to the case or not we leave undetermined.

For these reasons we think there is manifest error in the judgment of the court refusing to set aside the nonsuit that had been ordered in the case.

In this opinion the other judges concurred.

There can be no question of the soundness of the decision in this case. We have sometimes questioned how far the conductor of a railway train should be

allowed to require passengers to produce their tickets out of mere wantonness, and when he has no doubt they have them. It may be said this must be done or else others will feel aggrieved, when required to produce their tickets. Reasonable persons would never feel so, if *bonâ fide* dealt with in the matter. And if the passenger has the ticket present, it is no hardship to produce it. But if he happens to have left it at home or mislaid it for the moment, it requires some consideration how far the rule is to be enforced out of mere wantonness, when the passenger has paid his fare, and this is well known to the conductor. If the passenger stipulates in the purchase of a commutation ticket, to pay another fare unless he produce his ticket, as in *Downs* v. *N. Y. & N. H. Railroad*, 36 Conn. 287, he should be bound by the contract. But upon the mere force of a rule of the company to require the passengers to produce their tickets when so requested by the conductor, it seems to admit of some doubt, whether the penalty of paying double fare should be enforced, when the facts show that the passenger did all in his power to comply with the rule, and that the company suffered no detriment. The reason for the rule failing the rule itself ought to fail, upon the well known maxim, *cessante ratione cessat et lex*. It would rather seem that a rule of this kind enforcing the penalty in such a case as the present ought to be held unreasonable and therefore void to that extent. But we know that rules, to be of much value, require strict enforcement. And, where the ticket might be used by any one, the conductor might be justified in requiring its production, in order to secure the company against redeeming it again. I. F. R.

Supreme Judicial Court of New Hampshire.

ADAMS *v.* ADAMS.

Courts have power to set aside or vacate decrees of divorce for fraud or imposition, as in the case of other judgments, and will exercise that power where such fraud or imposition is clearly established.

THIS was a motion by Melinda Adams to set aside a decree of divorce granted in this county (Hillsborough), December Term 1864.

The libellee offered to show that the divorce was obtained without notice to her, and by fraud and perjury; that the libellant, George W. Adams, knew her residence at the time, and caused the order of notice to be published in a newspaper that he had every reason to believe neither she nor her friends would see, for the purpose of concealing from her any notice of the proceedings; that this motion was made at the first term of the court after she was informed that the divorce had been granted.

The libellee also offered to prove that the libellant had not remarried since the decree of divorce was granted.